

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
BRIEF**



76-7596

ORIGINAL  
WITH PROOF  
OF SERVICE

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UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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FRANK PASQUA,

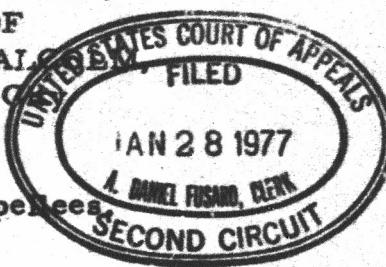
Plaintiff-Appellant,

B  
PIS

v.

NEW YORK CITY RETIREMENT SYSTEM;  
NEW YORK CITY DEPARTMENT OF  
CORRECTION and BENJAMIN J. MALCOLM  
as Commissioner of the New York City  
Department of Correction,

Defendants-Appellees



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ON APPEAL FROM A JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

---

BRIEF FOR PLAINTIFF-APPELLANT

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STEPHEN JENKINS  
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(6041B)

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Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK

---

BRIEF FOR PLAINTIFF-APPELLANT

---

PRELIMINARY STATEMENT

Plaintiff-appellant appeals from an Order of the  
District Court for the Southern District of New York (Judge  
Inzer B. Wyatt), which directed summary judgment in favor of  
the defendants and dismissed the instant action.

Plaintiff instituted the instant action pursuant  
to 42 U.S.C. 1983 seeking redress for deprivation of con-  
stitutional rights. The plaintiff is a former New York City  
Correction Officer. The defendants are New York City agencies

and the Commissioner of the New York City Department of Corrections. The complaint alleges six causes of action for deprivation of constitutional rights.

The first cause of action alleges defendants deprived plaintiff of his due process rights by denying him his Sixth Amendment right to confront his accusers at his departmental trial.

The second cause of action alleges that defendants violated plaintiff's Fifth Amendment right against self-incrimination by dismissing him from his public employment for refusing to answer questions allegedly concerning said employment but which were asked not in pursuit of a legitimate employer investigation, but were asked solely in an effort to deprive plaintiff of valuable pension rights.

The third cause of action alleges that defendants deprived plaintiff of his right to due process and violated his Fifth Amendment right against self-incrimination by attempting to coerce and elicit testimony from the plaintiff, under the guise of a non-existent employer-employee relationship, concerning the subject matter of a criminal investigation of which plaintiff was a target.

The fourth cause of action alleges that defendants violated plaintiff's Fourth Amendment right against unreasonable searches and seizures by engaging in constitutionally prohibited eavesdropping.

The fifth cause of action alleges that defendants violated the plaintiff's Eighth Amendment right by imposing an excessive punishment after a determination of his guilt of the departmental charges.

The sixth cause of action alleges that the defendants denied plaintiff his right to an effective appeal from the departmental trial by failing to support such determination by findings of fact and conclusions of law.

THE DECISION BELOW

The defendants moved for an order dismissing the action pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, on the grounds of failure to state a cause of action and lack of subject matter jurisdiction.

The court below converted the motion to dismiss into a motion for summary judgment, but failed to notify the plaintiff of same and give the plaintiff a reasonable opportunity to present material pertinent to the motion for summary judgment.

In its decision, the court below held that plaintiff's claims were barred by a prior state court adjudication and further held summarily that all claims so barred were frivolous and without merit. The court granted summary judgment for the defendants and dismissed the action.

STATEMENT OF FACTS

The plaintiff herein was, prior to his dismissal by defendants, a Correction Officer in the New York City Department of Correction, having served with an otherwise unblemished record for a period of twenty-two years (A3-A4)\*. By virtue of his length of service, plaintiff had pension rights which vested as a matter of law after twenty-two years of service (A4).

On or about December 29, 1972, plaintiff was subpoenaed to the Grand Jury of Bronx County, New York and was interviewed and questioned by Assistant District Attorney Epstein (A9). Plaintiff answered all questions asked of him, which questions clearly indicated that he was a possible target of the criminal investigation (A10).

On January 22, 1973, plaintiff informed his immediate superior, Warden Cunningham, of his intention to submit retirement papers and surrendered his shield and identification card (A10). The next day, January 23, 1973, plaintiff was suspended from duty, without pay (A10).

Thereafter and on or about February 5, 1973, despite plaintiff's suspension and imminent retirement, plaintiff was subpoenaed to appear before the New York City Department of Investigation to be questioned allegedly pursuant to

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\*Numbers in parenthesis refer to pages of the Appendix.

the employer-employee relationship (A10). Plaintiff was rescheduled to appear on February 7, 1973, in order to permit him time to obtain counsel (A10).

On February 7, 1973, plaintiff returned to the Department of Investigations where questions were asked of him which were objected to by plaintiff's counsel and which plaintiff refused to answer (A11).

Thereafter plaintiff was charged with four specifications of violations of the Rules and Regulations of the Department of Correction (A21, A23) and proceeded to trial on said specifications on March 15, 1973 (A11).

At the department trial, the only evidence submitted by the defendants consisted of the testimony of a Detective Frank Munari, the transcript of the questioning at the Department of Investigation and two tape recordings (A24-A74).

On the basis of said evidence, the plaintiff was found guilty of three of the four specifications (A21, A23). The penalty imposed was dismissal (A12).

Thereafter plaintiff instituted a proceeding in the New York State Supreme Court pursuant to Article 78 of the New York State Civil Practice Law and Rules (A18). The proceeding was transferred to the Appellate Division, First Department for determination pursuant to Section 7804 (g) CPLR (A19).

The Appellate Division confirmed the administrative determination and dismissed the petition without opinion.

48 A.D. 2d 768, 371 N.Y.S. 2d 369. Leave to Appeal to the New York State of Appeals was denied on July 8, 1975. 37 N.Y. 2d 706, 375 N.Y.S. 2d 1025. Thereafter the instant action was commenced.

CONCLUSION

The court below improperly converted the defendants' motion to dismiss into a motion for summary judgment without providing plaintiff with an opportunity to present material pertinent to the motion for summary judgment.

The court in its decision, erroneously held that the instant action was barred by res judicata and that any claims not so barred were without merit.

POINT I

THE COURT BELOW IMPROPERLY CONVERTED  
DEFENDANTS' MOTION TO DISMISS INTO A  
MOTION FOR SUMMARY JUDGMENT

Rule 12(b) of the Federal Rules of Civil Procedure provides in part as follows:

"If, on motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

The court below converted the defendants motion to dismiss into a motion for summary judgment ( A148 ), but failed to notify the plaintiff of its intent to so convert and failed to provide the plaintiff with a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Notice must be given to all parties that the court intends to treat a motion to dismiss as a motion for summary judgment and a reasonable opportunity must be provided to present additional material pertinent to the motion. Dale v. Hahn, 440 F. 2d 633 (2d Cir. 1971). The failure to provide a reasonable opportunity to present additional material on the motion is reversible error. Simms v. Mercy Hospital of Monroe, 451 F. 2d 171 (6th Circ. 1971).

The court below, by granting summary judgment to the defendants without permitting plaintiff to submit additional affidavits or to explain by affidavit the present unavailability of any facts essential to oppose the motion for summary judgment, precluded the plaintiff from demonstrating the existence of issues of fact with regard to the electronic eavesdropping, the questioning of the plaintiff at the Department of Investigation, and the introduction of evidence at the departmental trial derived from both of the above sources.

POINT II

THE ELECTRONIC EAVESDROPPING VIOLATED  
THE PLAINTIFF'S FOURTH AMENDMENT RIGHTS  
AND THE RECEIPT IN EVIDENCE OF THE  
FRUITS OF SAID UNLAWFUL SEARCH AND  
SEIZURE WAS CONSTITUTIONALLY PROHIBITED

All of the evidence received against the plaintiff at the departmental trial, with regard to Specifications numbered 1 through 3 was the direct and unlawful product of the illegal electronic eavesdropping conducted in violation of the plaintiff's Fourth Amendment rights.

The law is now clear that oral statements and utterances are encompassed within the protection afforded by the Fourth Amendment prohibition against unreasonable searches and seizures. Berger v. State of New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed. 2d 1040 (1967). The operation of the Fourth Amendment prohibition does not turn upon the presence or absence of a physical intrusion into any given enclosure but rather on an individual's reasonable expectation of privacy. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967).

The fundamental protections guaranteed by the Fourth Amendment are applicable to the States and enforceable against them through the Due Process of the Fourteenth Amendment.

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed 2d 431 (1965).

In the instant case, the only evidence presented against the plaintiff at the departmental trial held by the defendants, with regard to Specifications numbered 1 through 3,

was the testimony of one Detective Frank Munari and the tapes of conversations on two dates in which plaintiff participated and which conversations were overheard and recorded by means of electronic eavesdropping equipment (A24-A79). None of the participants to the conversations testified (A24-A79).

Detective Munari testified that a "bug" was installed in the home of Correction Officer Richard Curio on February 14, 1972 (A36-A37). The bug was in operation on November 15, 1972 (A37-A38) and on November 18, 1972 (A40-A41), the dates of the two recorded conversations used in evidence against the plaintiff. Detective Munari testified that he could identify the voice of the plaintiff on each tape and the voice of Correction Officer Richard Curio (A39, A41).

Detective Munari testified as to the substance of the two intercepted conversations (A39,A41). His testimony, in addition to the alleged tapes constituted all of the evidence against the plaintiff on the first three of the four specifications.

On cross-examination the detective admitted that he was not present when the "bug" was installed and was not involved in its installation ( A60 ). He also admitted that he was not present when the conversations were transmitted or recorded (A62).

The defendants presented no witnesses other than Detective Munari (A24-A79). Richard Curio, the Correction Officer in whose home the bug was installed, was not called

to testify and no explanation given for the defendants' failure to call him. No evidence was offered and none has been forthcoming that the "bug" was installed pursuant to judicial warrant or with the consent of one of the parties to the conversations. The defendants' unexplained failure to present any evidence to demonstrate the legality of the "bug" is strong evidence to the contrary.

A factual issue certainly exists as to the constitutionality of defendants' actions in receiving in evidence the tapes of the electronically intercepted conversations and the testimony of Detective Munari which was solely derived from the eavesdropping.

Evidence seized in violation of the Fourth Amendment prohibition is inadmissible in both criminal and civil cases.

Rogers v. U.S., 97 F. 2d 691 (1938). The Fourth Amendment does not distinguish between civil and criminal cases.

Laprease v. Raymours Furniture Company, 315 F. Supp. 716 (D.C. N.Y. 1970); U.S. v. Undetermined Quantity of Depressant or Stimulant Drugs, 282 F. Supp. 543 (D.C. Fla. 1968).

As to the Specification numbered 4, which charged that plaintiff failed to answer questions at the Department of Investigation concerning his employment, it is respectfully submitted that a comparison of the unconstitutionally seized conversations and the questions propounded to the plaintiff at the Department of Investigation, reveals that the questions asked were based upon information illegally gained by reason

of the unlawful eavesdropping. Since such questions were tainted by the unconstitutional seizure, the questioning itself was violative of plaintiff's Fourth, Fifth and Fourteenth Amendment rights. The questions and the transcript of the proceeding at the Department of Investigation should, therefore, not have been received in evidence against the plaintiff since it constituted "fruit of the poisoness tree."

The court below converted the defendants' motion to dismiss into a motion for summary judgment but failed to give notice of this to plaintiff or provide him a reasonable opportunity to present material pertinent to the motion for summary judgment. Had plaintiff been afforded such opportunity, he would have submitted a transcript of the taped conversations which, it is submitted, raise a factual issue as to whether the questions propounded at the Department of Investigations were based on unconstitutionally seized conversations.

Since the court below converted the motion to dismiss into a motion for summary judgment, the burden was on the defendants to establish that the eavesdropping conducted was not in violation of plaintiff's Fourth Amendment rights as alleged in the complaint. Defendants failed to meet their burden. No allegations are contained in defendants' motion even tending to establish or assert the constitutional validity of the electronic eavesdropping or the evidence and information derived therefrom. An issue of fact exists as to the constitu-

tionality of the electronic surveillance and its fruits, thus the granting of the motion for summary judgment was improper.

POINT III

THE DEFENDANTS DENIED PLAINTIFF  
HIS SIXTH AND FOURTEENTH AMENDMENT  
RIGHT TO CONFRONT AND CROSS-EXAMINE  
THE WITNESSES AGAINST HIM.

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In Goldberg v. Kelly, 397 U.S. 254, 269,90  
S.Ct. 1011, 1021, 25 L.Ed. 2d 287, the Supreme Court stated  
with regard to the right to confront and cross-examine  
witnesses at an administrative hearing:

"In almost every setting where  
important decisions turn on questions  
of fact, due process requires an  
opportunity to confront and cross-  
examine adverse witnesses. E.g., ICC  
v. Louisville & N.R. Co., 227 U.S.  
88, 93-94, 33 S.Ct. 185, 187-188, 57  
L.Ed. 431 (1913); Willner v. Committee  
on Character & Fitness, 373 U.S. 96,  
103-104, 83 S.Ct. 1175, 1180-1181,  
10 L.Ed. 2d 224 (1963). What we  
said in Greene v. McElroy, 360 U.S.  
474, 496-497, 79 S.Ct. 1400, 1413,  
3 L.Ed. 2d 1377 (1959), is particularly  
pertinent here:

'Certain principles have remained  
relatively immutable in our jurispru-  
dence. One of these is that where  
governmental action seriously injures  
an individual, and the reasonableness  
of the action depends on fact findings,  
the evidence used to prove the Govern-  
ment's case must be disclosed to the  
individual so that he has an opportu-  
nity to show that it is untrue. While  
this is important in the case of docu-  
mentary evidence, it is even more im-  
portant where the evidence consists  
of the testimony of individuals whose  
memory might be faulty or who, in  
fact, might be perjurers or persons  
motivated by malice, vindictiveness,  
intolerance, prejudice or jealousy.  
We have formalized these protections

in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment\* \* \*. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, \* \* but also in all types of cases where administrative \* \* \* actions were under scrutiny.' "

In this instant case the defendants deprived the plaintiff of his right to confront and cross-examine his accusers by relying solely upon hearsay evidence and by determining the plaintiff to be guilty on the basis of such evidence alone.

The voices on the tape recordings transmitted by means of the electronic bug, were the primary evidence upon which the plaintiff's guilt was determined. Yet the plaintiff was not confronted by any of the persons whose voices on the tapes bore evidence of his alleged misconduct. These persons did not testify or confront the plaintiff and the plaintiff was denied the right to cross-examine the individuals. The tape recordings were the equivalent of ex parte, unsworn statements being used in lieu of testimony against the plaintiff. This the Sixth Amendment prohibits. Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed. 2d 255.

As to Detective Munari, his testimony added nothing to the evidence with regard to Specifications numbered 1 through 3. He had no knowledge as to the installation of the "bug" ( A60 ); was not present when the voices were

transmitted (A62), and he did not record the transmissions (A62). He merely repeated in substance, that which he heard on the tape when he listened to it at a date subsequent to the actual conversations. All he could contribute was a highly suspect identification of the voices on the tape recording (A39, A41). His testimony was certainly insufficient by any standard to support the defendants' determination of plaintiff's guilt on the Specifications.

POINT IV

THE QUESTIONING OF THE PLAINTIFF  
AT THE DEPARTMENT OF INVESTIGATION  
AND HIS DISMISSAL FOR REFUSING TO  
ANSWER SAID QUESTIONS VIOLATED THE  
PLAINTIFF'S FIFTH AMENDMENT RIGHT  
AGAINST SELF INCRIMINATION

The questioning of the plaintiff at the Department of Investigation was violative of the plaintiff's Fifth Amendment privilege in that the questioning of the plaintiff was not in pursuit of a legitimate employer investigation but was conducted solely to force the plaintiff to choose between disclosing, during the course of a pending criminal investigation of which he was a possible target ( A10 ), his defenses to any possible criminal charges and other information of use to law enforcement officers who would not otherwise have access to such information without granting plaintiff full transactional immunity, or refusing to answer such questions and face the loss of his valuable pension rights.

While it was not argued that an employer should not be permitted to question an employer concerning his public employment, provided certain constitutional safeguards are complied with, it is respectfully submitted that the defendants may not, under the guise of an employer-employee relationship, question an employee for the sole purpose of aiding law enforcement officers who would not otherwise have access to such information without granting him transactional immunity pursuant to New York State statute.

Further, in order for an employer to question an employee and provide use immunity under the relevant Supreme Court cases,<sup>1</sup> a bonifide employer-employee relationship must first exist. In the instant case, at the time the petitioner was questioned at the Department of Investigation no legitimate employer-employee relationship existed since the petitioner had been suspended without pay since January 23, 1973 ( A10 ). The questions were asked of petitioner on February 7, 1973 ( All ) at a time when he had been temporarily deprived of his public employment and the emoluments thereof. A suspension is a temporary deprivation of one's office or position. Oxford English Dictionary.

The purpose and intent behind the questioning of the plaintiff at the Department of Investigation and the plaintiff's status while a suspended employee present factual issues which must necessarily be determined prior to a determination of the constitutional questions involved herein. Said factual issues precluded the granting of the motion for summary judgment.

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1. Gardner v. Broderick, 392 U.S. 273, 88 S. Ct. 1913, 20 L.Ed. 2d 1082 (1968); Uniformed Sanitation Men Association v. Commissioner, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed 1089 (1968); Lefkowitz v. Turley, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed 2d 274 (1973).

POINT V

DEFENDANTS VIOLATED PLAINTIFF'S  
EIGHTH AMENDMENT RIGHTS BY IM-  
POSING AN EXCESSIVE PUNISHMENT

The plaintiff herein was, prior to his dismissal by defendants, a Correction Officer in the New York City Department of Correction, having served with an otherwise unblemished record for a period of twenty-two years (A3-A4). By virtue of his length of service, plaintiff had pension rights which vested as a matter of law after twenty (20) years of service.

Viewed in the overall context of the plaintiff's many years of service, his prior working record and the loss of his vested pension rights, the punishment imposed as balanced against the infractions charged, constituted an excessive fine and cruel punishment in derogation of plaintiff's rights under the Eighth Amendment.

The rules and regulations of the Department of Correction are penal in nature and have the force and effect of law. Violation of said rules and regulations may result in the imposition of punishment, such as a fine that is penal in nature.

Laws are considered nonpenal in nature, only if they impose a disability, no to punish, but to accomplish some other governmental purpose. Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed. 2d 603.

The punishment involved herein was certainly penal in nature and excessive in application. The plaintiff has by reason of the punishment imposed, been deprived of his livelihood, denied valuable and vested pension rights, and stigmatized by a determination of misconduct. Such a punishment in light of the record, is excessive, unusual and unlawfully cruel.

POINT VI

THE INSTANT ACTION IS NOT BARRED  
BY THE DOCTRINE OF RES JUDICATA

The court below erred in holding that some of the plaintiff's claims were barred by the prior state court proceeding.

The prior state court proceeding brought on behalf of the plaintiff was instituted pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York. As such, the proceeding was brought to review the administrative proceeding and was not an action for affirmative relief for the deprivation and denial of plaintiff's constitutional rights. The issues raised in the Article 78, CPLR proceeding differed from those raised in the instant action and because of the different nature of the state court proceeding, the court's determination therein does not bar the claims asserted herein.

In the state court proceeding, the plaintiff alleged (A-18, Paragraphs 6, A-19 Paragraph 7):

a) that the evidence received as a result of the utilization of a bugging device did not adequately substantiate the Department's charges.

b) the the Department's principal witness had no personal knowledge of the events in question.

c) that there was no reasonable or plausible basis for the determination by the Department.

d) that the determination was grossly disproportionate to plaintiff's offense.

e) that the basis for the determination was the alleged wire tap evidence with no corroboration whatsoever and the refusal to testify before the Department of Investigation.

f) that the basis for imposing the penalty of dismissal was disproportionate to the offense and constituted a violation of plaintiff's Constitutional rights.

While the plaintiff in the state court proceeding challenged the determination of the defendants dismissing him for refusing to answer questions, such challenge, although raising constitutional issues, went directly to the power of the Department of Investigation to confer immunity under New York State law and the constitutionality of the New York State statutory scheme for conferring immunity. No such issues are presented herein. Plaintiff's causes of action in the instant matter alleging violation of Fifth Amendment rights concern defendants purpose, motive and intent, factual issues not raised or determined in the state court proceeding.

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1. A review of the plaintiff's brief in the state court proceeding wherein the issue of penalty was addressed (A-114) makes clear plaintiff never argued the constitutional question and it is uncertain whether the vague reference to "Constitutional rights" refers to the United States Constitution or the New York State Constitution.

The burden of proof in the state court proceeding was different from that required in the instant action. The test in the state court proceeding under Article 78, CPLR, was whether there existed "substantial evidence" to support the administrative determination. Section 7803 (4) CPLR. The "substantial evidence" test imposed a heavier burden of proof on the plaintiff than that required in the instant action. The state court proceeding, therefore, is not res judicata as to the instant action.

Respectfully submitted,

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Attorney for Plaintiff-  
Appellant  
Office & P.O. Address  
299 Broadway  
New York, New York 10007  
(212) 349-6770

STEPHEN JENKINS  
OF COUNSEL

STATE OF NEW YORK )  
COUNTY OF NEW YORK) ss.:

Murray H. Berman, being duly sworn,  
deposes and says that deponent is not a party to the action,  
is over 18 years of age and resides at 55 E 107 St,  
NY NY 10003.

That on the 28th day of January, 1977,  
deponent personally served the within

Brief for Plaintiff-Appellant  
upon the attorneys designated below who represent the  
indicated parties in this action and at the addresses below  
stated which are those that have been designated by said  
attorneys for that purpose.

By leaving two (2) true copies of same with a duly  
authorized person at their designated office.

By xdeponititngxxxxxxxxxxxxxx xdeponititngxxxxxx  
inx xax paxpaxax xdeponititng xdeponititng xdeponititng xdeponititng  
cox xdeponititng xdeponititng xdeponititng xdeponititng xdeponititng  
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Names of attorneys served, together with the names  
of the clients represented and the attorneys' designated  
addresses.

W. Bernard Richland  
Corporation Counsel  
Attorney for Defendants-Appellees  
Municipal Building  
New York, N. Y.

Sworn to before me this

28 day of January, 1977

Murray H. Berman

Michael DeSantis

MICHAEL DEANTIS  
Notary Public, State of New York  
No. 03-0930908  
Qualified in Bronx County  
Commission Expires March 30, 1978

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